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IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

No. 307

IN THE MATTER

of

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and ABRAHAM J. ISSERMAN,

Attorneys.

HAROLD SACHER, also known as "HARRY" SACHER,
an Attorney,

Petitioner,

and

ASSOCIATION OF THE BAR OF THE CITY OF
NEW YORK and NEW YORK COUNTY LAWYERS'
ASSOCIATION,

Respondents.

BRIEF FOR RESPONDENTS

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below.

The opinion of the District Court for the Southern District of New York is not reported but is printed at Tr. 237-71.¹ The opinions of the Court of Appeals for the

¹ In referring to the record in this case as "Tr.", this brief adheres to the mode of reference adopted by petitioner.

Second Circuit affirming the order below and denying a petition for rehearing and the dissenting opinions of Judge Clark are reported in 206 F. 2d 358 and 366 and also appear at Tr. 376-91 and 321-2.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 6, 1953, and its order denying the petition for rehearing was entered on August 20, 1953.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Question Presented.

Petitioner has been ordered permanently disbarred for professional misconduct from the Bar of the District Court for the Southern District of New York by order of that Court, affirmed by the Court of Appeals for the Second Circuit. The misconduct occurred in the course of the nine months' trial in that Court of *United States v. Dennis, et al.* (affirmed 183 F. 2d 201 (2d Cir. 1950), 341 U. S. 494 (1951)). In granting certiorari, this Court limited the question to the following question:

"Accepting the facts as found in the memorandum decision of Chief Judge Hincks, does permanent disbarment exceed the bounds of fair discretion, particularly in view of the punishment of petitioner's individual misconduct as a contempt and the finding that the proof does not establish that he so behaved pursuant to a conspiracy or a deliberate and concerted effort?"

The finding of Judge Hincks with regard to conspiracy was limited to the failure of respondents to sustain the burden of proof that certain of petitioner's individual mis-

conduct was pursuant to a conspiracy or deliberate and concerted effort with others (Tr. 265-7). He found expressly that petitioner had misbehaved deliberately—"with intent to delay and obstruct the trial" and "for the purpose of bringing the court into general discredit and disrepute" and in other respects (e. g., Tr. 268-9).

Statutes Involved.

The order of the District Court disbarring the petitioner is not based upon a statute. The federal courts have inherent judicial power to revoke licenses to practice before them. *Ex parte Garland*, 4 Wall. 333. (U. S. 1866). Petitioner was disbarred pursuant to Rule IV of the Rules of the District Court for the Southern District of New York, as then in force,³ set forth in Appendix 1, *infra*, p. 46.

Statement.

Petitioner was ordered disbarred from the Bar of the District Court because of his professional misconduct throughout the nine months' trial in that Court of the *Dennis* case, in which he represented certain defendants. The record in the *Dennis* case is part of the record in this case.⁴

The trial in the *Dennis* case involved 169 court days, extending over a period from January 17 to October 14,

³ Petitioner asserts his disbarment was governed by Rule 5(b) (Br. p. 3), although, as this appendix to his brief shows (p. 45), that rule was not adopted until after the order for disbarment.

⁴ That record was received in evidence as an exhibit in the District Court (Tr. 96). It is included in the record in this Court by stipulation (printed in petitioner's Br. pp. 47-8).

In this brief the record in the *Dennis* case is cited as "D. R."

1949. The misconduct of petitioner as found by Chief Judge Hincks occurred over the period from January 17 to September 29. (See Appendix 2, *infra*, pp. 47-50.)

Contempt Proceeding.

At the close of the *Dennis* trial, the trial judge filed a contempt certificate, in which he summarily convicted the defendants' lawyers, including petitioner, of criminal contempt of court and imposed sentence. The conviction was affirmed by the Court of Appeals (*United States v. Sacher*, 182 F. 2d 416 (1950)), as to all the specifications in the contempt certificate,⁴ except three. The first, charging, all lawyers involved with conspiracy, was reversed on the sole ground that a conspiracy would involve an agreement presumably made out of Court and not in the judge's presence, and accordingly could not be punished without a hearing.⁵ The other two individual specifications against this petitioner were reversed on the ground that the gist of each charge was thought not sufficiently clear in the certificate (182 F. 2d at 424-5).

Of the thirty-seven specifications of criminal contempt which the Court of Appeals affirmed, twenty involved this petitioner.⁶ His six months' sentence was not modified.

This Court upheld the power of the trial court to determine and punish the contempt summarily at the conclusion

⁴ The contempt certificate is set out in full in the appendix to Judge A. N. Hand's opinion (182 F. 2d 416, 430-53).

⁵ Only Judge Frank held that a hearing on this charge was *SC* required (182 F. 2d 416, 455). Judge Augustus N. Hand thought the record fully supported a finding of conspiracy (*id.* at 421-3). Judge Clark dissented on procedural grounds (summary conviction improper) (*id.* at 463-66).

⁶ Even after the Court of Appeals' decision, petitioner led the field with 20 specifications found against him. The score as to remaining counsel was Gladstein 16, Crockett 8, McCabe 5, Isserman 6, and Dennis 4.

of the trial and affirmed the convictions (*Sacher v. United States*, 343 U. S. 1 (1952)). Justices Black, Frankfurter and Douglas dissented on the ground that a judge other than the accusing trial judge should have passed on the charges and that there should have been notice and an opportunity for hearing (*id.* at 11, 25, 89).⁷

Disbarment Proceeding.

The disbarment proceeding was brought by the respondent Bar Associations in the District Court against this petitioner and another defense attorney.⁸ It was begun in April 1950 (Tr. 1) by order to show cause (Tr. 2-3) upon the petition of respondents (Tr. 3-4) and the accompanying affidavit (Tr. 5-56),⁹ shortly after the Court of Appeals' affirmance of the contempt conviction.

The charges against petitioner include all of the charges contained in the contempt specifications, with certain added citations to the *Dennis* record and a number of additional charges.

Unlike the contempt proceeding, petitioner had an opportunity to be heard. Also unlike that proceeding, the dis-

⁷ Justices Black and Douglas dissented on the further ground that the lawyers involved were entitled to a jury trial (343 U. S. 1, 14, 89).

⁸ Abraham J. Isserman, who had also been convicted of contempt but with a sentence of four months, was the other attorney. Judge Hincks ordered Isserman suspended from the Bar of the District Court for two years (Tr. 269-70). He has since been disbarred from the New Jersey State Bar by the unanimous opinion of its Supreme Court (9 N. J. 269, petition for rehearing denied, 9 N. J. 316 (1952)), and also from the bar of this Court by an evenly divided Court (*In re Isserman*, 345 U. S. 286 (1953)).

None of the other defense counsel in the *Dennis* trial were members of the Bar of the District Court.

⁹ In Judge Hincks' decision and throughout the proceeding below, references to numbered paragraphs of "the petition" have denoted the corresponding paragraphs of the affidavit. The same system will be used in this brief.

barment proceeding was not decided by the trial judge in the *Dennis* case. It took place before Chief Judge Hincks, a District Judge with twenty years of experience as such, sitting as designated visiting judge.

The disbarment proceeding came on for hearing on December 20, 1950, some eight months after decision in the contempt case by the Court of Appeals.

Called to account on charges of professional misconduct, petitioner failed to take the stand in his own behalf. His answer to the charges (in which Isserman joined) was not verified and denied none of the allegations of fact in the petition of the Bar Associations, other than that his action was in pursuance of a conspiracy (Tr. 56-79, 239).

In view of the lack of denials in the answer, the factual issues were "of very small compass" (Tr. 80). At the hearing, the only evidence introduced was the record of the trial and of the preliminary proceedings in the *Dennis* case (Tr. 98, 240).

On January 4, 1952, Judge Hincks filed his opinion (Tr. 237-71) and order (Tr. 274) permanently disbarring petitioner from the Bar of the District Court. His findings are analyzed below (pp. 13-17).

On July 6, 1953, the order of permanent disbarment was affirmed by the Court of Appeals (Judges Augustus N. Hand and Chase; Judge Clark dissenting; Tr. 276-91). After various motions and stays not material to the question before this Court, the petition for certiorari was submitted on August 31, 1953, and was granted by this Court on November 30, 1953, limited to the question stated *supra*, page 2.

Summary of Argument.

Petitioner was ordered disbarred for his continuing willful and deliberate attempt to delay and obstruct the trial in the *Dennis* case and to bring the Court into general credit and disrepute (Tr. 268-9), for persistently disregarding and disobeying repeated warnings and orders of the trial court to desist from unnecessary argument, comment and interruption of the proceedings (Tr. 246, 254), for making insulting, sarcastic, impertinent and disrespectful remarks to the Court, and for conducting himself intentionally in a provocative manner (Tr. 242-4, 253). In addition, he knowingly permitted the Court to be deceived "as gross a violation of his duty as a lawyer as an affirmative representation falsely made would have been" (Tr. 242).

Such, in brief, was the misconduct of petitioner as found by Judge Hincks.¹⁰ It is difficult to conceive of a case wherein the obligations of a lawyer as an officer of the Court could have been flouted more fully or more deliberately. One of the fundamental duties of a lawyer, as an officer of the Court, is "to maintain the respect due to courts of justice and judicial officers." *Bradley v. Fisher*, 7 Wall. 335, 355-6 (U. S. 1871). See also *Randall v. Brigham*, 7 Wall. 523, 540 (U. S. 1868).

The violation of these duties was recognized by the Court below when it stated:

"The proved instances of unprofessional conduct, constantly repeated in the face of the court's admoni-

¹⁰ A fuller analysis of these findings by Judge Hincks, as well as additional findings of misconduct by petitioner, appears, *infra*, 13-17.

tion, and continuing during a trial of extended duration, clearly demonstrates a lack of respect for the court and constituted a serious obstruction to the administration of justice" (Tr. 280-1).

Even the judge who dissented from the order of disbarment stated:

"I certainly have no wish to defend the conduct of the attorneys; nor have I ever" (Tr. 290).

Respondent Bar Associations as representatives of the profession and of the public are deeply aware of the seriousness of a disbarment, and that the power of the District Court in its discretion to disbar a lawyer

"... is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws." *Ex parte Wall*, 107 U. S. 265, 288 (1882).

However, in the instant case the facts as found by Judge Hincks fully support petitioner's disbarment. There is no basis for the contention that this conclusion exceeds the bounds of fair discretion.

The fact that the trial court, "in fairness to" petitioner, stated the record failed to disclose that petitioner's "conduct was tainted by venality or lack of fidelity to the interests of his clients" (Tr. 270), and found that respondent Bar Associations had failed to prove that petitioner joined with other defense counsel in a willful and deliberate conspiracy to obstruct the judicial process, is not dispositive of the issues before this Court. What is important

re the numerous findings that petitioner's conduct showed lack of fidelity to and disregard of his obligations to the Court, and a sustained and deliberate effort to obstruct the Dennis trial and to bring the Court into disrepute. The absence of a "conspiracy" only relieves petitioner from responsibility for the acts of his co-counsel; it does not condone or exonerate his individual misconduct (Tr. 266).

The conduct of petitioner and his fellow counsel in the Dennis trial "has been condemned by every judge who has examined this record under a duty to review the facts" and made comment upon it. This comment, made by this Court first in the contempt proceeding (343 U. S. 1, 13), and again in a disbarment proceeding (*In re Isserman*, 345 U. S. 86, 288), has been confirmed ~~and reiterated~~ by the four judges who have spoken in this disbarment proceeding.

When called as an officer of the Court to answer the various charges set forth in the specifications and with his professional life at stake, petitioner filed an unverified answer in which he denied none of the factual charges made against him except that which alleged that his actions were pursuant to a conspiracy with other counsel. He failed to take the witness stand in his own defense or to offer any evidence. This course of action is the more unexplainable and remarkable when it is recalled that the answer was filed some six months and the hearing held some eight months after the Court of Appeals had affirmed his conviction for contempt.

It is not surprising that Judge Hincks found that petitioner showed no recognition of the impropriety of his conduct. As the learned Judge said:

"Even in his answer he makes no admission of the misconduct so abundantly proven. He says only that his 'alleged' acts of misconduct . . . 'assuming that they manifested unprofessional

impropriety * * * do not evidence unfitness * * * for professional practice.' Surely if even when pleading to the pending petition he did not recognize the impropriety of his past conduct I cannot safely assume that his perception will be more acute after a period of suspension" (Tr. 251-2).

The Court of Appeals agreed, stating:

"It is evident that the respondent [petitioner] either was unable to comprehend his obligations to a Court of Law or was unwilling to fulfill them when he felt it inexpedient to do so" (Tr. 281).

Hence, to argue as does petitioner that "respect for the courts, and the integrity of the legal profession . . . , have been amply vindicated by the heavy contempt sentences meted out to Mr. Sacher . . ." (Br. p. 31) as ground for disciplinary action short of disbarment is not persuasive. Punishment for criminal contempt, like the severity of the jail sentence imposed for the commission of a crime, should have no materiality or relevancy on the issue of disbarment; rather, the issue is the fitness of petitioner to meet his obligations and responsibilities as a member of the Bar of the District Court, and both of the courts below found petitioner's conduct indefensible.

Finally, throughout petitioner's brief he refers to his "unblemished record" prior to the *Dennis* case (e.g. Br. pp. 10, 25; see also 33). Yet he has no standing to do so. Faced with charges of extreme gravity, he did not take the stand or submit to cross-examination; he offered no evidence whatsoever with regard to his conduct prior to that trial.¹¹ His "unblemished record" is no more than the

¹¹ Petitioner is not justified in stating that the Court below described his previous conduct as "unblemished" (Br. pp. 10, 25). The only time the word "unblemished" is used in the majority opinion is in referring to petitioner's own argumentative assertions: "Basically, the respondent's [petitioner's] argument is that in view of his previous unblemished record, disbarment is too severe a discipline . . ." (Tr. 280).

supported assertion of petitioner. The most that can be said is that there is no evidence in the record that he had been convicted of a crime or that he had previously been disciplined.

That petitioner may be "exceptionally capable" as he claims in his brief (Br. p. 43), is beside the point. If it be the fact, it makes his deliberate misconduct in a difficult and lengthy trial attendant with nationwide publicity and his lack of recognition of his obligations and duties as an officer of the Court the more serious and reprehensible. Such an argument leads to one conclusion,—the more capable the lawyer, the more contumacious and disrespectful to the court he may be.

No more deserving is petitioner's appeal for sympathy on the ground that he has represented labor and minority groups. Suffice it here to quote from Judge Frank's concurring opinion affirming the contempt conviction (182 F. 416, 454):

"We affirm the orders punishing these lawyers not because they courageously defended their clients, or because those clients were Communists, but only because of the lawyers' outrageous conduct—conduct of a kind which no lawyer owes his client, which cannot ever be justified, and which was never employed by those advocates, for minorities or for the unpopular, whose courage has made lawyerdom proud. The acts of the lawyers for the defendants in this trial can make no sensible man proud."

ARGUMENT.

I.

Accepting the facts as found by Judge Hincks, petitioner's disbarment was fully warranted and within the bounds of fair discretion.

Petitioner's misconduct as found by Judge Hincks included a continuing deliberate attempt to delay and obstruct the trial and to bring the District Court into discredit and disrepute (Tr. 268-9).

Yet petitioner's brief persists in disregarding the findings of fact as to the deliberate and willful character of petitioner's misconduct. Possibly the emphasis which petitioner has placed on the finding of no conspiracy has caused him to miss the significance of the finding of fact that petitioner's own misconduct was deliberate. Furthermore, he attempts to minimize various details of his misconduct and, having done so to the best of his power, ignores the aggregate.

In introducing his argument (Br. p. 9), petitioner's only reference to the order of disbarment is to state that it is "undisputed that" it "is based on episodes and alterations in open court which, however culpable, occurred in the course of a single and singularly tense and protracted trial." Such an understatement falls when the findings and the record are examined.

Clearly the conduct and actions of petitioner must be considered as a whole. As the Court below rightly observed: " * * * of course the quality of that conduct may be judged, and should be judged, against the background of the entire record" (Tr. 240). Appendix 2 to this brief (pp. 46-50, *infra*) shows that the several instances found

Judge Hincks as constituting misconduct by petitioner occurred on 62 separate days of the trial, beginning with the first day and ending with the 160th. This is the more remarkable when it is remembered that petitioner was in court only 145 of the 169 court days (Tr. 169). Put more succinctly, petitioner was found guilty of misconduct on an average of almost every other day he was in court.

The Facts as to Misconduct as Found by Judge Hincks.

The petition in the disbarment proceeding set forth charges against petitioner which had not been contained in the contempt certificate. Its governing Paragraphs are numbered 14, 15 and 16 (Tr. 7-48). Paragraph 14 included the charge of conspiracy, adding citations to incidents in the record not appearing in the contempt certificate. Paragraph 15 included fourteen specifications of individual misconduct in addition to the twenty-two in the contempt certificate. Paragraph 16 made new charges against petitioner individually.

In his memorandum decision (Tr. 237-71), Judge Hincks took up each of the charges made against petitioner and set out in the governing Paragraphs of the petition (Tr. 7-48). He found the following misconduct and violations of professional duty requiring the disbarment of petitioner:

(A) Paragraph 14:

"With intent to delay and obstruct the trial, he [petitioner] disregarded numerous warnings of the court concerning wilful, delaying tactics and persisted in making long and repetitious arguments and protests . . . and . . . needless reiterations of objections of others" (Tr. 268-9).

"For the purpose of bringing the court into general discredit and disrepute (a) he insinuated that various findings made by the court were made for

purpose of newspaper headlines," (b) "he accused the court of prejudice and partiality," and (c) "made disrespectful, insolent and sarcastic comments and remarks to the court, many of which were with intent to provoke the court into intemperate action which might be availed of as ground for mistrial or later as error on appeal" (Tr. 269).

(B) Paragraph 15 (Tr. 241-6):

[1] II.¹² Petitioner charged that the hearing "is just a sham and a pretense" (Tr. 15).

[2, 3] III and V. Petitioner accused the trial judge of trying the case for the newspapers, and not in accordance with law (Tr. 15, 17).

[4] IV. Petitioner charged that the trial judge was ruling in violation of his judicial duty, saying, among other things, "this is an Alice in Wonderland procedure. We always get the sentence first and then the trial." He also charged that he was circumscribed by the judge "because the evidence is becoming too devastating for the Government" (Tr. 16-17).

[5] VI. After Isserman had persisted, despite the court's ruling, in arguing concerning what he claimed was an interruption by the Court in order to "misconstrue a statement" of counsel, petitioner continued the argument in the guise of observations to the Court (Tr. 18).

[6, 7, 8, 9] VIII, XI, XIX, XXXIII. Each of these specifications shows that petitioner charged the Court with unduly favoring Government counsel over the defense (Tr. 21, 24, 33, 44).

[10, 11, 12, 13] X, XXII, XXV, XXXV. Petitioner accused the Court of refusing to listen, of

¹² Roman numerals indicate subparagraphs of Paragraph 15 of the petition.

announcing "predeterminations in advance even of the making of motions and the hearing and consideration of evidence", stated that "advocacy no longer has a place in our courts", and asked whether there would come a day when the Court would hear defense counsel (Tr. 22, 35, 38, 46).

[14] XIII. When the Court pointed out that certain testimony was not inconsistent, as petitioner had inferred, the latter retorted that "this witness might be lying" (Tr. 27).

[15-23] XIV, XVI, XXIV, XXVII, XXX, XXXI, XXXII, XXXIII and XXXIV. Petitioner, in these instances, charged the Court with making a provocative remark and treating the defense lawyers like "dogs in the courtroom", while protesting he did not want to show any disrespect "and you know it" (Tr. 29); said he never could tell what would happen "with your Honor up there" (Tr. 32); insolently characterized the Court's conduct in making rulings (Tr. 37); disobeyed the Court's order to desist from further argument, insisting that one of the defendants was being tried for things not charged in the indictment (Tr. 39); characterized admissions by one of defendants of prior false statements as "pretty small pickings" (Tr. 41); claimed the Court's conduct was "unjustified" (Tr. 43, 44); and persisted in arguments (Tr. 44, 45).

[24] XX. Petitioner concealed facts from the Court and actively attempted to prevent their disclosure (Tr. 34).

[25] XXI. Petitioner not only continued to argue, contrary to the Court's directions, but claimed that the defense counsel were "being estopped from proving the truth" (Tr. 34).

[26] XXVIII. Petitioner criticized the Court for remarking on petitioner's smiling and charged that the defense counsel were "under surveillance" by

the Court "but you never see anything that the prosecution does" (Tr. 46).

[37] **XXIX.** Petitioner charged that one of the defendants, as a witness, was being "crucified unnecessarily" by the Government, and that the defense was not being permitted "to complain of the injury that is being inflicted on us" (Tr. 41).

[28] **XXXVI.** Petitioner indulged in highly offensive comment concerning the United States Attorney and refused either to explain or apologize when it was called to his attention (Tr. 46).

(C) Paragraph 16:

Petitioner "persistently, in disregard of repeated warnings and orders of the Court, argued without permission and refused to desist from argument and comment" (Tr. 246-54, 47).

Petitioner "made insolent, sarcastic, impertinent and disrespectful remarks to the Court and conducted" himself "in a provocative manner" (Tr. 255, 47).

Of the foregoing items, Judge Hincks held that the twenty-eight proved specifications of Paragraph 15, standing alone, required disbarment (Tr. 246); that specification **XX** of Paragraph 15 (item 24 above) in itself required disbarment (Tr. 241-2); that specification **XXXVI** of Paragraph 15 (item 28 above) taken with other incidents of provocative conduct cited in Paragraph 16 of the petition in themselves required disbarment (Tr. 244); that each of the two types of courses of misconduct under Paragraph 16 required disbarment (Tr. 254, 255); and that the deliberate courses of misconduct described in Paragraph 14 would by themselves require disbarment (Tr. 268-9).

In addition, the Court sustained the other charges in Paragraph 16 in two respects, viz.: that petitioner improperly interrupted the Court and counsel, and that he "shouted, snickered and sneered, all without regard or

respect for the dignity of the court" (Tr. 255). The Court held, however, these latter findings did not of themselves warrant disbarment but, if standing alone, would have required lesser punishment (Tr. 254, 255-8, 47).

1. Petitioner's Refusal to Accept Certain Findings in This Court,—in Disregard of This Court's Limitation.

This Court in granting certiorari required acceptance of the facts as found by Judge Hincks and limited argument before it to the propriety of permanent disbarment. Nevertheless, in his brief, petitioner has gone beyond this limitation and has attacked some of the findings of fact made by Judge Hincks. Assuming *arguendo* that such attacks were within the purview of the issues before this Court, they are without merit.

Judge Clark in dissenting from the disbarment order in the Court of Appeals stated that Judge Hincks had "acted with dignity and devotion" and that his concern to be fair "led him to make markedly favorable fact findings for" petitioner (Tr. 285).¹² In other words, he considered Judge Hincks' findings of fact against the petitioner amply justified.

The findings disputed by petitioner will be taken up in the order used in petitioner's brief.

1. Paragraph 15, Specification XX.

Judge Hincks found that this Specification, and 27 other specifications of Paragraph 15, were fully proved, and constituted unprofessional conduct warranting disbarment

¹² Possibly Judge Clark had in mind the failure to find a conspiracy with other counsel. Indeed, if respondents were not bound by this Court's limitation to accept the facts as found, it could be urged with the support of Judge Augustus N. Hand (182 F. 2d 416, 420-3), and of Judge Learned Hand (183 F. 2d 201, 225), that the record of the *Dennis* trial clearly shows such deliberate concerted action on the part of the defense attorneys.

(Tr. 341, 346). While that "holding" was "too plainly required to justify discussion", two of the 28 involved "misconduct of such gravity as to warrant comment" by themselves (Tr. 341). Specification XX was one of them.

Briefly stated, it charged as follows (Tr. 34): petitioner was permitted by the trial judge to address certain questions to a government witness, Nicodemus, concerning prior criminal proceedings. Judge Medina expressly stated his understanding that counsel was bringing out a conviction of crime. Petitioner knew that the Judge was permitting his questions under that misapprehension. Petitioner also knew from the endorsement on the photostat of the indictment then in his possession (which somewhat later he offered in evidence) that the witness had not been convicted of crime, but had on the contrary been "adjudged not guilty . . . after hearing in open court" (D. R. 4834).

The gravamen of the charge was thus that petitioner, knowing of Judge Medina's misunderstanding, continued a line of questioning which was permitted solely on the basis of that misunderstanding and failed to disclose the actual facts within his knowledge to the trial court.

Judge Hincks found that this constituted grave misconduct, as petitioner's action was intentionally deceptive. The deception was as gross as an affirmative representation falsely made would have been (Tr. 241-2).

Petitioner devotes over five pages of his brief (pp. 15-20) to disputing Judge Hincks' finding of fact on this charge. His argument is based, first, on an attempt to excuse his own failure to deny the charge or testify with respect to it (Br. pp. 15-16), and second, on a charge that Judge Hincks failed in his duty as a judge by not questioning him about the matter (Br. pp. 18-20).

On examination, his arguments are completely lacking in merit. They are untenable, both in fact and in law.

As to his excuses for not denying the charge, it will be remembered that petitioner had sought to reverse the contempt conviction on the ground that he was entitled to a hearing. Given the opportunity to testify in the more serious disbarment proceeding, with his professional life at stake, he did not avail himself of it.

As Judge Hincks stated:

"... with the record replete with instances of extended argument not wanted by the judge, the respondent here is shown as silent when his professional duty required him to speak" (Tr. 242).

to the same effect is the statement of the Court of Appeals (Tr. 278):

"* * * The accused attorney owed the court the greatest frankness in a proceeding such as this. Cf. *Matter of Randel*, 158 N. Y. 216, 221."

In the *Randel* case, involving a disbarment, the court stated:

"The defendant declined to be sworn in his own behalf at the trial. This refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict" (158 N. Y. at 219).

"If there was any possible statement that the defendant could have made, calculated to explain his conduct and relieve himself from the serious consequences of the facts as disclosed by this record, he should have taken the stand, made a full statement and submitted himself to cross-examination." (*id.* at 221).

Curiously, the petitioner states "the decision [in *Matter of Randel*] appears to be clearly correct" (Br. p. 17, note 13). Does a different standard from that applicable to other lawyers apply to this petitioner when he is accused of professional misconduct?

As to the duty of the attorney to meet fully and fairly the charges against him in a disbarment action, see also:

Ex parte Wall, 107 U. S. 265, 275 (1882);

Thatcher v. United States, 212 Fed. 801, 806-7 (6th Cir. 1914), appeal dismissed, 241 U. S. 644 (1916);

Cobb v. United States, 172 Fed. 641 (9th Cir. 1909), in which the Court stated at p. 644:

"The burden was upon him to show that statements made in the communication which were scandalous upon their face were not maliciously or willfully published, or were not false, and he cannot complain that upon his refusal to sustain such burden of proof, or to adduce any testimony whatever, the court took the information to be true."

Since petitioner refused to avail himself of the opportunity to testify in the disbarment proceeding, even with respect to the additional charges of misconduct specified by respondents in Paragraphs 15 and 16, and which were not involved in the contempt certificate, if ill becomes petitioner now to say that he "cannot reasonably be held to have failed in his duty of frankness because he did not select from these multitudinous charges, *as particularly requiring his testimony*" this particular charge (Br. pp. 17-18 (*Italics supplied*)).

Petitioner's statement that in "his argument before Judge Hincks, counsel for the bar associations did not even mention Specification XX" (Br. p. 17; see also p. 8) is utterly without force. The fact is that petitioner himself,

appearing *pro se*, stated at the opening hearing, that he desired only to treat with the larger questions as well as the law applicable in oral argument during the hearings, but that he would discuss the detailed incidents in the brief (Tr. 82). With respect to these latter, there obviously could be no opportunity for questioning by the trial court. Respondents' initial brief filed before Judge Hincks, directed a full paragraph, on page 35, exclusively to that particular specification.¹⁴

Petitioner further seeks to place the blame for his failure to testify upon Judge Hincks,—a truly amazing position. Aside from the effrontery of the suggestion that Judge Hincks failed to do his duty, it shows petitioner's warped concept of the duty of an attorney to the court of which he is an officer. It is particularly remarkable in view of the fact that Judge Hincks asked petitioner three times during the hearing, whether he had any evidence to produce and whether the record was closed (Tr. 110, 114, 115; see also 10 *et seq.*).

Petitioner cannot transfer blame to the Court for his own failure to testify and the cases he cites do not support such a proposition. They merely state that the attorney is entitled to a hearing, and petitioner had one. [*People v. Turner*, 1 Cal. 143 (1850) and *In re Samuel Davies*, 3 Pa. 116 (1880), both cited by petitioner (Br. p. 19, note

¹⁴ Petitioner errs also in his statement of "the chronology of these proceedings" which he states Judge Hincks and the Court of Appeals overlooked (Br. p. 17). The disbarment proceeding was commenced on April 14, 1950 (Tr. 1) by order to show cause at that date (Tr. 2-3), nine days after the Court of Appeals decision; petitioner's answer was filed October 16, 1950; the trial was held December 21, 1950, and briefs were filed thereafter. As a matter of fact, petitioner stated in his brief in the Court of Appeals (p. 11) that he had chosen to meet this charge "by demurrer" and argued that the finding that he knew of the trial judge's misapprehension, clearly a finding of fact, was a conclusion of law. The Court below was "not impressed" with his argument (Tr. 278).

35]. Other cases cited held that in disciplinary proceedings a lawyer may be called upon to answer or refute evidence which would not be admissible in a criminal proceeding. (*Matter of Joseph Santosuosso*, 318 Mass. 489 (1945), in which the court admitted in a disbarment proceeding as evidence over the objection of the accused attorney, testimony in a separate action.)

The language quoted by petitioner from Chief Judge Cardozo's opinion in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465 (1928), on which petitioner appears particularly to rely (Br. pp. 19-20), dealt with the challenge by the appellant, in connection with a general investigation of ambulance chasing conducted by a court, of "the power [of the court] to inquire by methods appropriate and adequate, and so by compulsory processes if search would otherwise be warranted." It was not a disbarment proceeding and it is a far cry from a holding that it was the duty of a court to make inquiry of an attorney who fails to answer charges of professional misconduct brought against him. That case actually held that a lawyer (the appellant there) had been properly jailed for contempt for refusing to testify when subpoenaed to do so in the general investigation.

Ex parte Brounsall, 2 Cowper 829 (K. B. 1778), cited by petitioner as establishing the power and responsibility of a court to elicit facts concerning attorneys, did not deal with or refer to that question. It merely held that an attorney who had been convicted of "stealing a guinea" and imprisoned for nine months should be disbarred as an unfit person to practice as an attorney, even though no misconduct could be imputed to the attorney in the four or five years since his conviction.

Paragraph 15, Specification XXXVI.

This charge involves the following statement by petitioner while arguing a motion at the end of the case:

"They [the early Christians] did so many things, more than this evidence disclosed, that if Mr. McGohey were a contemporary of Jesus he would have had Jesus in the dock." (Tr. 46)

Mr. McGohey, the prosecutor, was well known to be a member of the Catholic Church (Tr. 46-7).

When Mr. McGohey expressed indignation, the Court requested petitioner to refrain from any such reference, stating that it was "a terrible thing to say". The record then shows:

"The Court: You don't even apologize for it.

"Mr. Sacher: I am proceeding with my argument, your Honor. I have no apologies to make".¹⁵
(Tr. 47)

Judge Hincks found this conduct provocative in the extreme and a direct violation of Canon 17 of the Canons of Professional Ethics. This Court is respectfully referred to Judge Hincks' further comments (Tr. 242-4).

Petitioner is in error in indicating in his brief (p. 20) that it was solely on the basis of this colloquy that Judge Hincks reached his conclusion that petitioner was a master in the art of inflammation and habituated to the practice of that art. Judge Hincks expressly stated this conclusion is corroborated by other instances of provocative conduct
* * and by the insincerity of his frequent disclaimer of

¹⁵ In the light of the judge's suggestion of an apology, petitioner is hardly entitled to indicate that the situation was not such as to encourage an apology" (Br. 21, note 37), as the record will show (Tr. 46-7).

disrespectful intent in comments reflecting on the Judge, shortly followed by repetitions of the offense" (Tr. 244).

While the Court below apparently did not consider this instance as serious a breach of professional ethics as did Judge Hincks, it did state that the remark

"... was capable of misapprehension. When its purpose and effect were evidently misunderstood as an attack upon the opposing counsel's religion, Sacher clearly should not have refused to apologize or explain" (Tr. 279).

It must be remembered that this intentionally provocative remark, capable of being considered an attack on opposing counsel's religion, was made on September 29, the 160th court day, and that it was one of a series of intentionally provocative remarks made by petitioner over the preceding nine months of trial.

2A. Paragraph 15—Other Specifications.

Petitioner's Brief does not attempt to deal with the 26 other specifications in Paragraph 15 as such, except to state, erroneously, that Judge Hincks made no findings with respect to the disciplinary measures they required.

The fact is that Judge Hincks found that "the proved specifications of Paragraph 15, standing alone, require an order of disbarment" (Tr. 246). These of course included the two just discussed.

Petitioner does refer to some of these specifications under the following heading.

3. Paragraphs 14 and 16.

Again petitioner ignores Judge Hincks' express finding that petitioner's proved misconduct under Paragraph 14 was done deliberately "with intent to delay and obstruct

the trial", and "for the purpose of bringing the court into general discredit and disrepute" (Tr. 268-9; see Br. pp. 23, 24). The misconduct under Paragraph 16 also was found to be deliberate (Tr. 246-54, 255).

This willful and deliberate use of delaying and obstructive tactics in disregard of warnings and even orders of the trial judge and the continual making of intentionally provocative, insolent and sarcastic comments to the court, all more fully described above, represented a course of conduct of which instances occurred throughout the trial, from first to last (see Appendix 2, *infra*, pp. 47-50). This course of conduct, as the Court below stated,

"... constantly repeated in the face of the Court's admonitions, and continuing during a trial of extended duration, clearly demonstrate a lack of respect for the Court and constituted a serious obstacle to the administration of justice" (Tr. 281).

Petitioner has stated that he does not undertake to justify his behavior in a number of the instances disclosed by the record (Br. 25). He would have this Court treat the instances as separate and not constituting a course of conduct, although Judge Hincks did not so regard them. At the same time, he attempts to dispose cavalierly in one paragraph of his brief of 42 citations of the *Dennis* record (Br. p. 23), and in another paragraph with 29 citations (Br. p. 24). Again, he ignores the deliberate, willful and persistent course of misconduct found by Judge Hincks.

The disruptive effect of this type of conduct and its interference with the orderly administration of justice cannot be doubted. Nor can the effect of such conduct be more clearly and succinctly stated than was done by Judge Hincks:

"... it is clear that the control of the volume of argument is a matter which lies wholly within the discretion of the trial Judge" (Tr. 247).

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"... the respondent's [Sacher's] persistent violation of the Judge's ban on argument and statement of grounds was in no respect necessary for the safeguard of the client's rights and I cannot believe that the persistence of this respondent was attributable to any *bona fide* belief that his conduct was necessary to protect his client's rights. . . .

"When we come to gauge the seriousness of such misconduct it becomes at once apparent that it has a two-fold impact on the judicial process. . . . It tends to breed disrespect for all manifestations of judicial authority not only in the particular proceeding in which it occurs but also in other proceedings as well and thus tends to create a public reaction which is destructive of law and order. If judicial authority is not allowed to prevail in the court room it cannot be expected to command that respect on the part of the general public which is essential to the stability of government and especially of a government which is bottomed on the consent of the citizens. ^

"Such conduct also is serious for its time-consuming effect on judicial proceedings. . . . [Such] activities on trial necessarily impair the underlying capacity of the judicial establishment to cope with the never-ending flow of judicial business. Such tactics . . . create impatience and disrespect with the judicial process and may even jeopardize the achievement of the ultimate goal by diverting attention from the basic issues and creating confusion obstructive to the development of the truth" (Tr. 248-9).

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"Conscientious compliance by attorneys with judicial rulings made in the course of a trial, subject of course to the right of appeal so liberally provided by law, is peculiarly essential in any system of law such as ours. . . . Without such compliance, the trial Judge is faced with a dilemma. If he allows the trial to proceed notwithstanding violations of his directions he loses control of the conduct of the trial. Or if he bars the offending lawyer from further participation in the trial, the client is left for the time being without representation to which he is constitutionally entitled. Certainly here such action would have necessitated a mistrial since obviously a lawyer suddenly called into the case without preparation could not possibly have furnished adequate representation of the client's interests. A situation requiring a mistrial is always to be avoided: it causes delay and wasted effort and occasionally, at least, for its effect in thus obstructing justice, is even courted by defendants who has [sic] exhausted other dilatory tactics.

"Tested against this analysis, it is plain that the quality of such misconduct, if proved in sufficient volume, will constitute a serious obstruction to the administration of justice. And that the volume of Mr. Sacher's proved misconduct was enough to make it a serious obstruction is all too clear from the record. . . . [T]ime and again, by special orders and standing orders he, like the other lawyers in the case, was directed to desist from time-consuming argument and comment but promptly again offended. Judicial reprimands of progressive severity were insufficient for his restraint. And, finally, cautions reminding him of liability for a future accounting for his contumacy proved equally ineffective" (Tr. 249-251).

As to the finding of misconduct charged in Paragraph that petitioner "made insolent, sarcastic, impertinent

and disrespectful remarks to the Court and conducted" himself "in a provocative manner", Judge Hincks stated:

"That such conduct was unprofessional needs no exegesis: I so hold. Even more closely than that dealt with in the preceding Section it touches the vitals of the judicial process: even greater is its tendency to obstruct the attainment of personal justice. And the proven volume of this misconduct also was such as to constitute a serious obstruction to the proper conduct of the trial. . . . Insolent and disrespectful remarks to the Court tend to undermine the judicial authority indispensable to the power effectively to cope with such intrusions which by their very nature obstruct the development of the real merits of the case" (Tr. 255).

Finally, in his discussion of Judge Hincks' findings, petitioner urges as excusing his misconduct the length and complexity of the *Dennis* trial, and the stresses and strains upon those concerned (Br. pp. 26-8). This involves a thinly veiled attack upon the handling of the trial by the trial judge.

The very importance of the *Dennis* case and the difficulty of the issues involved, and the fact that the trial would necessarily be a long one, even without the time-consuming activities of defense counsel, should impose on conscientious counsel as officers of a court an additional sense of obligation to refrain from misconduct. Judge Hincks stated that under those circumstances

"... one would expect that a conscientious lawyer ... would also have perceived the impact of conduct such as his on the judicial process. Of what avail is the vindication of one constitutional principle if attained only by the sacrifice of such a fundamental constitutional institution as a fair jury trial conducted not as the tactics and passions of counsel

should suggest but under the supervision of the trial judge! The increasing length of trials, especially those involving criminal conspiracies, taxes to the utmost the proper technique of Anglo-Saxon justice and the capacity of the judicial establishment, as every lawyer must know. For the solution of this problem, the proper historic cooperation between Bench and Bar is indispensable. The length of a trial adds increased need for such cooperation—not proper occasion for its sabotage" (Tr. 252).

The Court of Appeals agreed that the extraordinary nature of the trial "provided no excuse for the many instances of misconduct of which respondent was guilty" (Tr. 280).

Certainly petitioner, whose activities were found deliberately to have added to the length of the trial cannot plead that length as an excuse.

The extent to which defense counsel contributed to the length of the trial is shown by the announcement by the trial judge on May 11, the 70th day of the trial, that "out of 8860 pages of the record already made, at least 1554 pages represented argument by defense counsel, without counting the testimony or what had been said by the attorneys for the Government, or by himself. In addition to persistent argument—often contrary to direct comment of the court—the record shows frequent provoking statements and objections by the appellants concerning trivial matters" (182 F. 2d 416, 423).

With regard to petitioner's attempt to excuse certain instances of his misconduct, or at least to soften its degree, by indicating that the stresses of the trial were felt also by the trial judge and to blame him for his caustic and critical comments (Br. pp. 26-27), let it be remembered that it was not the trial judge but another judge, with twenty

years' experience on the bench, who, in this disbarment proceeding, found that petitioner deliberately conducted himself "with intent to provoke the Court into intemperate action" (Tr. 269). And the Court will not overlook that other defense counsel were convicted of contempt for engaging in similar action at the same trial.

A study of the *Dennis* record clearly indicates that the trial judge performed a truly remarkable feat in avoiding a mistrial although his orders and rulings and warnings were deliberately thwarted, disobeyed and disregarded.

The conduct of counsel, including petitioner, and the fortitude of the trial judge were well described by Judge Learned Hand in the unanimous opinion (Judges Swan and Chase concurring) affirming the *Dennis* conviction (183 F. 2d 201, 225-6):

"All was done that could contribute to make impossible an orderly and speedy dispatch of the case; and whether this was, as the judge found, because of a deliberate and concerted effort to wear him down, there can be no doubt that such a concert would have been manifested in precisely the same form. The trial was punctuated over and over again with motions for a mistrial, even for patently frivolous reasons; by insinuations, and at times openly, the judge was charged with unfairness and 'judicial misconduct'—often in most insulting language. . . . At times, it is true, he rebuked the attorneys; at times he used language short of requisite judicial gravity; at times he warned them that if they persisted in conducting themselves as they had been doing, he would punish them when the trial was over. (An entirely proper action . . .) What he did do, was to attempt to keep the trial within measurable bounds; and in that he failed, because, and only because, the attorneys were obviously unwilling to accord him that

cooperation which was his due, so far as it did not curtail their clients' rights. The length of the trial is itself almost an answer to that; the defense's case occupied nearly twice as much time as the prosecution's . . . The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Bhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess."

As Mr. Justice Frankfurter observed in his dissenting opinion in the contempt case (343 U. S. 1, 39):

"Counsel are not freed from responsibility for conduct appropriate to their functions no matter what the encouragements and provocations."

And he also stated:

"These specifications charged misconduct of a nature especially reprehensible when committed by lawyers, who, as officers of the court, are part of our judicial system. As such they are under a duty to further, not obstruct, the rational and fair administration of justice" (id. at 26).

"I would not remotely minimize the gravity of the conduct of which the petitioners have been found guilty, let alone condone it" (id. at 27).

And as Mr. Justice Jackson stated, speaking for the majority as to the behavior of counsel (id. at 5):

" . . . it consisted of breaches of decorum and disobedience in the presence of the jury of his orders and rulings upon the trial; the misconduct was professional in that it was that of lawyers. . . . In addi-

tion, conviction is not based on an isolated instance of hasty contemptuous speech or behavior, but upon a course of conduct long-continued in the face of warnings that it was regarded by the court as contemptuous. The nature of the deportment was not such as merely to offend the personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial."

II.

Petitioner's individual misconduct, found by Judge Hincks to include deliberate attempts to obstruct the trial and to bring the Court into disrepute and disquiet, fully warranted disbarment, even though conspiracy with others was not proved.

That the deliberate and persistent misconduct of petitioner throughout the course of the trial, entered into with intent to delay and obstruct the trial and to bring the Court into general disrepute and disquiet, and his deliberate and persistent disregard of the orders of the Court in volume sufficient to constitute a serious obstruction to the trial itself, all as found by Judge Hincks, fully warranted the order of disbarment from the District Court, has been discussed above. Clearly, he is professionally accountable for his own conduct as an officer of the Court.

The fact that the proof does not establish that he so misbehaved pursuant to a conspiracy or agreement with others, is immaterial. True, an agreement between defense attorneys to obstruct justice would be a serious matter and might make each responsible for the acts of the others pursuant to the conspiracy. However, petitioner's own acts, extending over the entire period of the trial, were sufficiently grave to warrant his disbarment.

If petitioner had been the sole counsel in a similar case and had engaged in identical misconduct, there could equally have been no question as to the necessity for his disbarment from the trial court.

It must be remembered that the course of conduct and acts of petitioner found to be professional misconduct by Judge Hincks go far beyond the 20 specifications of which he was found guilty in the contempt proceeding. In the latter, the acts charged as a conspiracy were thrown out when Specification I was reversed by the Court of Appeals. In the disbarment proceeding (not being a criminal action), the District Court could, and very properly did, hold that the gist of the charge was the wrongful conduct, and the allegation of conspiracy was surplusage (Tr. 288). Individual instances of professional misconduct, in addition to those in his contempt conviction, were found to constitute professional misconduct in this proceeding. In addition, the serious charges against petitioner set forth in Paragraph 16 were not included in the contempt certificate.

In affirming the conviction of petitioner and others for contempt, the majority of this Court, by Mr. Justice Jackson, stated as to criminal trials (343 U. S. 1, 8, 14):

"The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders."

• • • • •

"[This Court] will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling."

The District Court through the disbarment order was protecting the processes of orderly trial in its court by disbarring an officer of that Court. That officer, petitioner, by reason of a persistent and deliberate course of conduct had shown such disregard for his duties as an officer in the trial of a difficult case that:

"It is evident that [petitioner] either was unable to comprehend his obligations to a court of law or was unwilling to fulfill them when he felt it inexpedient to do so" (Tr. 281).

Isserman, whose misconduct in the *Dennis* trial Judge Hincks found warranted suspension for two years and not disbarment (Tr. 270), and who was convicted of criminal contempt on the basis of six specifications, as against petitioner's twenty, has since been disbarred from the New Jersey bar (*In re Isserman*, 9 N. J. 269, rehearing denied, 9 N. J. 316 (1952)).

On the basis of his disbarment in New Jersey, this Court issued a rule requiring Isserman to show cause why he should not be stricken from the rolls of this Court. He was ordered disbarred by an evenly divided Court (*In re Isserman*, 345 U. S. 288 (1953)).

In speaking for the Justices favoring disbarment, Mr. Chief Justice Vinson stated (*id.* at 289):

"The absence of a conspiracy is given as a ground against disbarment. Nothing in our rules refers to conspiracy as a factor. To make it the turning point in this disbarment proceeding would be tantamount to our stating that recurring disobedience is not cause for disbarment unless accompanied by a conspiracy."

Petitioner's gross misconduct far exceeded that of Isserman as found by Judge Hincks.

If the *Isserman* case had come before this Court on the record herein, with Judge Hincks' finding that Isserman's lesser misconduct warranted only a two-year suspension, and without the disbarment order of the New Jersey Supreme Court, it may well be that he would not have been ordered disbarred. Naturally if, added to his lesser misconduct, he could have been charged with the misconduct of the other counsel, particularly petitioner's, which would have been the effect of a finding of conspiracy, a different situation would have been presented as to him in this Court.¹⁰

In passing on the measure of discipline for Isserman, on the basis of his misconduct, Judge Hincks determined that with the discipline of suspension there was reasonable expectation that in the future he might "be safely expected to exercise without abuse the privileges of membership in this Bar." He made the opposite determination with respect to petitioner (Tr. 270).

While conspiracy is not a necessary requirement for disbarment, it should be noted that in both the contempt proceeding and in the disbarment proceeding there was no finding that there was not a conspiracy or concerted effort between counsel. In the contempt proceeding, Judge Frank held that the defendants were entitled to a hearing on the existence of an agreement of conspiracy. Judge Augustus N. Hand held that the facts warranted a finding of conspiracy. In the disbarment proceeding, the only finding was that the burden of proof had not been met.

¹⁰ In the New Jersey disbarment proceeding, the Court referred to Isserman's prior conviction for statutory rape and his six months' suspension from the New Jersey bar by reason of that conviction, although the Court stated that the controlling consideration was his conviction of contempt (9 N. J. 269, 279). In the proceeding in the District Court, Isserman did not take the stand or submit to cross-examination, and neither his conviction nor his suspension from the New Jersey bar was disclosed.

As Judge Learned Hand stated for the unanimous Court of Appeals in the *Dennis* appeal (183 F. 2d 201, 225):

"All was done that could contribute to make impossible an orderly and speedy dispatch of the case; and whether this was, as the judge found, because of a deliberate and concerted effort to wear him down, there can be no doubt that such a concert would have been manifested in precisely the same form."

In any event, there can be no doubt upon the record below that petitioner's individual misconduct fully warranted his disbarment without his having to be charged with the misconduct of others.

III.

The disbarment of petitioner was not a punishment but because he was unfit to be a member of the bar of the District Court; his punishment for contempt does not make the disbarment exceed the bounds of fair discretion.

The real issue in this case is as stated by Judge Hincks (Tr. 250):

"[The] problem now is not to fix the measure of the punishment which the [petitioner] may deserve but rather to decide what safeguards are reasonably required for the maintenance of the proper professional standards of the Bar of this Court."

That the purpose of disbarment is not punishment, but rather the removal of officers of the court found unfit to practice, is well settled.

Ex parte Wall, 107 U. S. 265, 288 (1882);

Ex parte Brounsall, 2 Cowper 829 (K. B. 1778);

Matter of Rouss, 221 N. Y. 81 (1917), certiorari denied, 246 U. S. 661 (1918).

The District Court and the Court of Appeals applied this rule (Tr. 250, 280).

The removal of an attorney whose misconduct has shown deliberate obstruction of the administration of justice is essential for the protection of the Court itself and the public, as well as the integrity of the legal profession.

As has been well stated in the *Schofield Discipline Case*, 362 Pa. 201, 214-5 (1949):

"The respondent is not now charged with contempt of court but with misbehavior in his office of attorney. . . . A contempt proceeding for misbehavior in court is designed to vindicate the authority of the court; on the other hand, the object of a disciplinary proceeding is to deal with the fitness of the court's officer to continue in that office, to preserve and protect the court and the public from the official ministrations of persons unfit or unworthy to hold such office."

See also:

In re Adriaans, 17 U. S. App. D. C. 39 (1900);
United States ex rel. Hallet v. Green, 85 Fed.
 857 (C. C. D. Colo. 1898).

If conviction of a crime or conviction of contempt, with the resulting punishment, were required to be considered by a court in connection with disbarment, the court would be prevented from removing from its rolls an attorney whom it found unfit by fundamental "temperament" and from whom "similar misconduct may be expected." Certainly the court's discretion should not be so limited.

Had the Court decided that it would be sufficiently protected by an order of suspension for a term, then obviously the Court might consider the extent of the punishment for contempt in determining the length of suspension from the bar.

It has previously been noted that petitioner showed no recognition of his professional misconduct or contriteness in the District Court. Even the affirmance of his conviction for contempt did not make petitioner acknowledge any serious misconduct. His lack of conception of his duty to the Court is further shown by his failure to testify. And in the Court of Appeals petitioner appeared *pro se* and merely stated in his brief that he does not "assert that his conduct was faultless."

If the bringing of the disbarment proceeding, putting petitioner's professional life in jeopardy, was not sufficient to bring him to recognize the impropriety of his conduct, it is difficult to believe that his service of his sentence for contempt, to which he was then sentenced, could be relied upon as effecting a change in petitioner. Judge Hincks correctly concluded that "I cannot safely assume that his perception will be more acute after a period of suspension" (Tr. 251-2). Disbarment, therefore, was the only course open for the protection of the court, the profession and the public.

IV.

Permanent disbarment of the petitioner from the District Court was required and was well within the bounds of its discretion.

We come now to the final question as to whether in ordering permanent disbarment for such misconduct the District Court exceeded the bounds of its fair discretion.

That the District Court has the power to determine the fitness of an officer of that Court to remain a member of its bar and that its decision will not be modified unless

it exceeded the bounds of fair discretion, is implicit in the question fixed by this Court (*supra*, p. 2). This principle is well established. In *In re Claiborne*, 119 F. 2d 647, 650-1 (1st Cir. 1941), the Court said:

"In proceedings for the disbarment or discipline of attorneys, the reviewing court will upset the judgment of the lower court only on a showing of abuse of discretion or great irregularity."

See also:

Ex parte Burr, 9 Wheat. 529 (U. S. 1824);

Ex parte Bradley, 7 Wall. 364 (U. S. 1868);

Kingsland v. Dorsey, 338 U. S. 318 (1949)¹⁷;

In re Chopak, 160 F. 2d 886 (2d Cir. 1947), certiorari denied, 331 U. S. 835 (1947)¹⁸.

In his attempt to show an abuse of discretion, petitioner has sought to minimize the seriousness of his breach of duty as an officer of the court. He places heavy reliance on *Bradley v. Fisher*, 13 Wall. 335 (U. S. 1871), cited at eight places in his brief. That case, in which Mr. Justice Field delivered the Court's opinion, was not a disbarment or disciplinary action. It was an action by an attorney seeking damages against a judge who had ordered him disbarred, the Court holding that such an action did not lie. However, the Court discussed at length the duty of

¹⁷ Petitioner has overlooked the reversal by this Court in *Kingsland v. Dorsey*, *supra*, of the lower court decision cited by him (Br. p. 36, note 60, citing *Dorsey v. Kingsland*, 173 F. 2d 405). Presumably it was on the basis of the lower court's decision that petitioner spoke of reviewing the disbarment record *de novo* (Br. p. 37).

¹⁸ Petitioner cites *In re Dos*, 95 F. 2d 386 (2d Cir. 1938) as being in conflict with this principle (Br. p. 37). However, that decision turned on the failure of the District Court to make appropriate findings, and the Court remanded the case, stating that the appeal cannot be disposed of as the record stands (*id.* at p. 387).

an attorney as an officer of the Court. Measured against the standards of conduct laid down by Mr. Justice Field¹⁹ in the paragraph of the opinion immediately following petitioner's quotation (Br. p. 35), the conduct of petitioner falls far short:

"But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers" (13 Wall. 335, 355):.

Petitioner urges that there has been no precedent for "so severe a judgment in comparable circumstances" (Br. pp. 38-9). But he cites no cases involving "comparable circumstances." The fact is that the *Dennis* trial was of unusual length, requiring 169 court days and involving complicated issues. A careful search of the cases has disclosed no other case in which officers of the court for such a sustained period have so flagrantly and persistently and deliberately violated their duties to the court with intent to obstruct the trial and to bring the court into disrepute, all as described above. Petitioner's course of misconduct began on the first day of trial and continued through to the 160th (see Appendix 2, *infra*, pp. 47-50).

While faced with misconduct that was atrocious and which even the dissenting judge in the Court of Appeals

¹⁹ Petitioner refers to Mr. Justice Field's disbarment before his service as a judge in the early days of the California gold rush but neglects to state that it was reversed because the District Judge had acted summarily and permitted no hearing or explanation. *People v. Turner*, 1 Cal. 143 (1850). (Is this a suggestion that petitioner and Mr. Justice Field should be compared? If his opinion in *Bradley v. Fisher*, *supra*, is any indication, Mr. Justice Field would have concurred in the disbarment of petitioner.)

termed "abominable", Judge Hincks carefully considered whether a lesser punishment would adequately safeguard the court, stating:

"... the controlling test is whether this court, if it allows the respondents [petitioner and Isserman] to continue as members of its Bar, can safely rely upon their future compliance with the directions of the trial judge in the discharge of his responsibility for the conduct of trials and in other respects faithfully discharge their responsibility as officers of the Court" (Tr. 250).

With respect to this petitioner he concluded:

"I regret that in my considered opinion the proved misconduct which is the basis of the first charge of Par. 16²⁰ demonstrates that Mr. Sacher has not satisfied that test" (Tr. 251):

This failure by petitioner to recognize the impropriety of his conduct led Judge Hincks to conclude:

"I cannot safely assume that his perception will be more acute after a period of suspension" (Tr. 252).

He further noted that the misconduct was due to his "temperament" (Tr. 270) and that "his recalcitrance was congenital requiring an order of disbarment" (Tr. 254) and that if petitioner remains at the bar "similar misconduct may be expected" (Tr. 251).²¹

²⁰ The misconduct referred to under Paragraph 16 was that petitioner "persistently, in disregard of repeated warnings and orders of the court, argued without permission and refused to desist from argument and comment" throughout the course of the trial (Tr. 246; see Appendix 2, *infra*, p. 49).

²¹ Judge Hincks reached the opposite conclusions as to Isserman (Tr. 270).

In reaching his conclusions, Judge Hincks had the benefit of observing petitioner's conduct in the disbarment proceeding.

Under such circumstances, disbarment was not only within the bounds of fair discretion but was required. As stated by this Court in *Ex parte Wall*, 107 U. S. 265, 288 (1882), when a clear case of misconduct affecting the standing and character of the attorney is shown to exist,

"... the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws."

See also *Ex parte Burr*, 9 Wheat. 529, 530 (U. S. 1824).

Petitioner urges that the proper test of disbarment is whether "it is clear that a lawyer will never be one who should be at the Bar" (Br. p. 35). Yet later he states that a disciplinary proceeding which "hinges on the prospect of an individual's future behavior requires a judgment which cannot, in the nature of things, be based on absolute certainty" (Br. p. 42). It is obviously the District Court, acting with respect to its Bar, which must make that judgment within the bounds of fair discretion.

Presumably as bearing upon the question of abuse of discretion by the District Judge, although in form an appeal to the sympathy of this Court, petitioner refers to his conduct in the four years since the *Dennis* trial. Evidence of this asserted "conduct" obviously is not in the record. Even if in the record, the fact that petitioner acted well, if such be the case, with an order of disbarment hanging over his head which had not been finally disposed of is hardly satisfactory assurance as to his future conduct. In any event, conduct subsequent to the disbarment proceed-

ing cannot be controlling on the question of the exercise of fair discretion.²²

In his conclusion, petitioner places great emphasis on his so-called "unblemished" or "blameless" record prior to the *Dennis* case (Br. p. 42; see also pp. 7, 10, 25, 33). There is no basis for that plea here. A lawyer called to account before the Bar on charges of professional misconduct owes the greatest duty of frankness to the Court (*supra*, pp. 19-21 and cases there cited). An equal duty of frankness is owed to an appellate court.²³ At no point in these proceedings has petitioner shown the candor and frankness required of a member of the profession.

The record contains no evidence whatsoever with regard to his conduct prior to the *Dennis* trial, nor any finding by Judge Hincks. As his professional past was not before the Court, the statement can be taken as little meaning.

Petitioner's statements with regard to his past, taken from his oral argument *pro se* before Judge Hincks, not under oath and not subject to cross-examination, quoted in his brief (pp. 42-43) are obviously self-serving and are not entitled to be considered a part of the record.²⁴

Petitioner's closing reference to the afterglow of Judge Learned Hand's praise of his professional conduct in the

²² As to his record since the *Dennis* trial, petitioner refers to two cases cited in the dissenting opinion of Judge Clark (Tr. 283). In *United States v. Hall*, 198 F. 2d 726 (2d Cir. 1952), the opinion by Judge Clark himself comments favorably on petitioner's professional ability but not on his conduct. In the second, *United States ex rel. Nukk v. District Director*, 205 F. 2d 242 (2d Cir. 1953), the opinion contains no comment on either ability or conduct. But even if it had, the order of disbarment was not from the Court of Appeals, but from the District Court. The misconduct in the *Dennis* case could not be duplicated in an appellate court.

²³ Petitioner stated (Br. p. 10) that he has not been disbarred by the courts of New York. He did not state that disbarment proceedings were commenced against him in April 1952 in the New York Supreme Court, Appellate Division, First Department and are pending.

²⁴ Although petitioner frequently so states (Br. pp. 10, 25, 33), the Court of Appeals did not describe his past record as "unblemished"; its only use of that word was in referring to his identical argument based on his assertions as to his record (Tr. 280).

Dennis case (Br. p. 43) is disingenuous to say the least. The words quoted by petitioner have been taken completely out of context in the opinion affirming the *Dennis* case.²⁵ In the same opinion, Judge Hand denounced the conduct of petitioner and the other counsel in the *Dennis* case in no uncertain terms (183 F. 2d 201, 225). It is not an "after-glow" in which any lawyer would be glad to view his professional conduct.

Conclusion.

The functioning of the trial processes in the District Court is at the foundation of the judicial system. It is within the power only of the courts and the members of the profession to protect this system. The maintenance of high standards of integrity and conduct of the bar is essential to the impartial administration of justice on which in turn true democracy depends.

Respondents, as representatives of the legal profession and of the public, are deeply aware of the importance of an independent and responsible bar, which shall not merely be faithful to its clients but also recognize its obligations to the courts and to the public. The profession and the courts have frequently been criticized for failure to enforce the standards which they profess and which are necessary to preserve public confidence in judicial institutions and to protect the courts and the public. Respondents are also

²⁵ The words are taken out of a statement by Judge Hand as to whether defendant Davis could claim reversible error on the ground that petitioner's representation of Davis in the *Dennis* trial was unsatisfactory and the trial judge should have permitted Davis himself to sum up in lieu of petitioner. In holding that it was not reversible error, Judge Hand stated (183 F. 2d 201, 225):

"Davis had been represented during the whole trial by Mr. Sacher with great skill, loyalty and address; Davis had indicated not the slightest dissatisfaction with the manner in which Mr. Sacher had conducted himself; nor did he do so when he asked leave to substitute himself in addressing the jury."

deeply aware of the serious consequences to a lawyer of disbarment. But when a case of clear and serious misconduct exists, the courts ought not to hesitate from sympathy for the individual to protect the greater interest of the courts and of the public. Certainly one who has shown a complete misunderstanding of the obligations of an officer of the court or, if he does understand them, has been willing intentionally to disregard them, should not remain on the rolls of the bar. Such a case is here presented.

If the grave, willful and deliberate misconduct of this petitioner, sustained throughout a nine-months' trial and involving the complete flouting and disregarding of orders and warnings of the court, and provocative and insulting conduct, does not warrant disbarment from the bar of the trial court, there would seem to be no limits beyond which an officer of the court might not safely go. Here petitioner has been found by the court of which he is a member to have engaged in such misconduct in a deliberate attempt to delay and obstruct the orderly processes of a trial, and to bring that court and the administration of justice into discredit and disrepute.

Nor do we believe that the disbarment of petitioner will deter other counsel of integrity and high standing from representing individuals in unpopular causes. It is not because of the clients petitioner represented, but because of his own personal misconduct and its effect on the courts, the bar and the public, that the respondents urge the affirmance of the judgment below.

It is respectfully submitted that the question presented in this Court should be answered in the negative, and that the judgment of the Court below should be affirmed.

March 4, 1954.

ELS WHITNEY DESBOISSE,
Counsel for Respondents.

Appendix 1.

Rule IV of the Rules of the District Court for the Southern District of New York, which was in effect at the time of the proceeding before Judge Hincks and the entry of the order disbarring petitioner, provided, in so far as relevant:

"Any member of the Bar of this Court may be disbarred, suspended from practice for a definite time or reprimanded for good cause shown, after opportunity has been afforded such member to be heard."

Appendix 2.

Dates of Acts Found by Judge Hincks to Constitute Professional Misconduct as Basis for Disbarment of Petitioner.

Paragraph 14

Date	Court Day	Dennis Record*
February 4, 1949.....	13	1,085-92
February 11, 1949.....	18	1,572
February 14, 1949.....	19	1,573-74
February 14, 1949.....	19	1,658-71
February 25, 1949.....	25	2,277
March 1, 1949.....	27	2,475-76
March 30, 1949.....	44	3,700-02
March 30, 1949.....	44	3,728-30
April 5, 1949.....	48	4,059
April 11, 1949.....	52	4,402
April 25, 1949.....	58	4,965-68
May 4, 1949.....	65	5,456
May 18, 1949.....	75	6,131
May 26, 1949.....	81	6,565
June 7, 1949.....	87	6,936
June 9, 1949.....	89	7,066
July 28, 1949.....	120	9,220-21
August 8, 1949.....	127	9,751-52
August 19, 1949.....	136	10,464
August 22, 1949.....	137	10,525
August 29, 1949.....	142	10,856
September 9, 1949.....	148	11,212-13

* The citations to the Dennis record referred to by Judge Hincks as supporting his findings are referred to with respect to Paragraph 14 of the Bar Associations' petition as they relate to petitioner at Tr. 288-89, with respect to Paragraph 15 at Tr. 241-46, and with respect to Paragraph 16 at Tr. 246-54, 255.

Paragraph 15

Subparagraph of
Paragraph 15
of the
Agreement
Between

Date	Count Day	Section Number	Amount Paid
January 21, 1949.....	5	II	384
January 27, 1949.....	7	III	623-34
February 2, 1949.....	12	IV	1,046-80
February 4, 1949.....	13	V	1,085-89
February 4, 1949.....	13	VI	1,124-38
February 14, 1949.....	19	VIII	1,573-74
			1,610
			1,857
			1,961
March 7, 1949.....	28	X	2,538
March 16, 1949.....	35	XI	3,046-47
March 25, 1949.....	42	XIII	3,588-89
April 5, 1949.....	48	XIV	4,058-59
April 19, 1949.....	56	XVI	4,787-89
April 22, 1949.....	57	XIX	4,807
April 22, 1949.....	57	XX	4,823-34
April 25, 1949.....	58	XXI	4,882-85
			4,967-88
May 5, 1949.....	66	XXII	5,528-39
May 20, 1949.....	77	XXV	6,344
May 24, 1949.....	79	XXIII	6,411
May 26, 1949.....	81	XXIV	6,565
June 7, 1949.....	87	XXVII	6,937
June 9, 1949.....	89	XXVIII	7,084
June 9, 1949.....	89	XXIX	7,087
June 30, 1949.....	102	XXX	8,045
August 1, 1949.....	122	XXXI	9,408-05
August 5, 1949.....	126	XXXII	9,731
August 29, 1949.....	142	XXXIII	10,852-56
September 9, 1949.....	148	XXXIV	11,313
September 14, 1949.....	151	XXXV	11,432
September 29, 1949.....	160	XXXVI	12,086-97

Paragraph 16†

Date	Court Day	Denale Record
January 17, 1949.....	1	97
January 19, 1949.....	3	252 et seq.
February 3, 1949.....	12	1,065-56**
February 4, 1949.....	13	1,066-90**
February 4, 1949.....	13	1,137-39**
February 7, 1949.....	14	1,174-76**
February 7, 1949.....	14	1,183-83**
February 9, 1949.....	16	1,266**
February 9, 1949.....	16	1,462-54**
February 10, 1949.....	17	1,497-98**
February 11, 1949.....	18	1,561
February 11, 1949.....	18	1,572-73**
February 14, 1949.....	19	1,660-64**
February 15, 1949.....	20	1,802-03
February 17, 1949.....	22	1,929
February 17, 1949.....	22	1,937-39**
February 18, 1949.....	23	2,066-98**
March 1, 1949.....	27	2,475-76**
March 7, 1949.....	28	2,638
March 7, 1949.....	28	2,640-41
March 11, 1949.....	32	2,837-38
March 14, 1949.....	33	2,943**
March 15, 1949.....	34	2,995**
March 15, 1949.....	34	3,010-12
March 15, 1949.....	34	3,013**
March 23, 1949.....	40	3,352
March 23, 1949.....	40	3,361-62**
March 23, 1949.....	40	3,425-27
March 24, 1949.....	41	3,494-95

† Judge Hincks found certain charges under Paragraph 16 as ground for disbarment and as "abundantly" supported "by the stated references to the record" in the Bar Associations' petition (Tr. 246, 255; see discussion, *supra*, pp. 16, 24-25). He also found certain other charges in Paragraph 16, not in themselves warranting a lesser punishment than disbarment, as also supported by the record (Tr. 254-55, 256). All the citations from Paragraph 16 are set forth above. In his brief to this Court, petitioner admits that the charges of Paragraph 16 found by Judge Hincks to warrant disbarment are supported by those references in the following table indicated by a double asterisk (**) after page number (Br. pp. 23-25).

Date	Court Day	Dennis Record
March 25, 1949	42	3,588
March 30, 1949	44	3,681
March 30, 1949	44	3,742-43**
March 30, 1949	44	3,769-71**
April 5, 1949	48	4,059**
April 7, 1949	50	4,268**
April 12, 1949	53	4,505**
April 12, 1949	54	4,534-35**
April 22, 1949	57	4,806-07**
April 22, 1949	57	4,880-82**
April 27, 1949	60	5,085**
April 28, 1949	61	5,153-55**
May 4, 1949	65	5,456**
May 4, 1949	65	5,509**
May 18, 1949	75	6,118-19
May 18, 1949	75	6,164**
May 23, 1949	78	6,368**
May 26, 1949	81	6,565**
June 7, 1949	87	6,936-37**
June 8, 1949	88	7,029**
June 30, 1949	102	8,045
June 30, 1949	102	8,051-52**
July 12, 1949	108	8,476-77**
July 12, 1949	108	8,533-34**
July 13, 1949	109	8,576-77**
July 26, 1949	118	9,086
July 27, 1949	119	9,151
July 27, 1949	119	9,167-68
July 27, 1949	119	9,209
July 28, 1949	120	9,220**
July 28, 1949	120	9,222-23**
July 26, 1949	118	9,082
August 8, 1949	127	9,751-52**
August 19, 1949	136	10,464
August 22, 1949	137	10,524-25**
August 22, 1949	137	10,542
August 29, 1949	142	10,856**
September 14, 1949	151	11,432
September 22, 1949	157	11,842-43
September 22, 1949	157	11,852**
September 23, 1949	158	11,886